

ISSUE

May a part-time municipal judge have an “of counsel” relationship with a law firm that has an existing “of counsel” relationship with the municipal attorney whose job responsibilities include the prosecution of municipal ordinance cases before the judge?

ANSWER

No.

FACTS

A part-time municipal judge currently practices law as a sole practitioner. A law firm would like to create an “of counsel” relationship with him to assist the firm’s attorneys with civil tort litigation. The judge would be reviewing files, drafting documents, and making court and deposition appearances on behalf of the firm’s clients. He would be an independent contractor and the firm would pay him on an hourly basis. The judge would maintain his independent law practice. He would establish an office in the law firm’s space. The “of counsel” designation would be included on his business card, letterhead, and various telephone listings.

The municipal attorney for the municipality where the judge presides is currently “of counsel” to the same law firm. The attorney is the sole shareholder in a professional service corporation providing legal services. He rents office space from the firm, which includes library, computer and copy services. He also reimburses the firm for any secretarial services he uses. The attorney and the firm’s attorneys do work for each other’s clients and they also have mutual clients. The attorney includes his “of counsel” status on his letterhead and is listed on the firm’s web site as being “of counsel.” When working on firm matters, he uses the firm’s stationery and identifies himself as being “of counsel.”

Part of the job responsibility of the municipal attorney is to prosecute municipal ordinance cases before the judge. The municipal attorney subcontracts this prosecution work to an independent outside attorney. The subcontracted attorney is paid directly by the municipal attorney but does not have any other relationship with the municipality, the municipal attorney, the municipal judge, or the law firm.

DISCUSSION

The issue presented involves the following provisions of the Code of Judicial Conduct:

SCR 60.03 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

A. SCR 60.03(1) states:

A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. SCR 60.03(2) states:

A judge may not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge may not lend the prestige of judicial office to advance the private interests of the judge or of others or convey or permit others to convey the impression that they are in a special position to influence the judge. A judge may not testify voluntarily as a character witness.

SCR 60.04 A judge shall perform the duties of judicial office impartially and diligently.

A. SCR 60.04(1)(g) states:

A judge shall accord to every person who has a legal interest in a proceeding, or to that person's lawyer, the right to be heard according to law. A judge may not initiate, permit, engage in or consider ex parte communications concerning a pending or impending action or proceeding

SCR 60.03(1) sets the standards for dealing with the public's perception of the integrity and impartiality of the judiciary. As is pointed out in the comment section to SCR 60.03(1):

The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

These appearances are viewed from the perspective of the public, which expects a high standard of conduct on the part of judges. A judge must be careful that the judge's behavior, on or off the bench, does not undermine public confidence in the integrity and impartiality of the judiciary.

The totality of the relationship between the municipal judge, the law firm, and the municipal attorney must be examined from the perspective of the public. The nominal designation the parties use to describe the relationship or their contractual relationships is not controlling. Reasonable people could believe the judge and the municipal attorney

are equal parts of the same law firm. Both defendants and the public could perceive the municipal attorney has undue influence on the judge. The reasonable perception of unfairness should ban the proposed “of counsel” relationship of the firm with the judge. In the alternative, if the municipal attorney ceases to be “of counsel” to the firm, the municipal judge could be “of counsel” to the firm without offending the prohibitions of Chapter 60.

The municipal attorney has a continuing working relationship with the law firm. The municipal attorney and the firm’s attorneys work on each other’s cases and have mutual clients. He uses the firm’s stationery when dealing with the firm’s clients. On his stationery he designates himself as being “of counsel” to the firm and is listed on the firm’s web site as being “of counsel.” In the eyes of the public, these factors would clearly indicate that the relationship between the municipal attorney and the firm is more than that of a landlord/tenant. This perception is reinforced by the fact that the attorney shares office space and various services with the firm. Internal agreements between the attorney and the firm that govern their relationship would not have any effect on the public perception that the municipal attorney is part of the law firm.

The municipal judge is also planning a continuing working relationship with the law firm. The judge will be drafting documents on behalf of the firm’s clients for distribution to the court and third parties. He will be making appearances at depositions and in court with the firm’s clients. He will be disclosing his “of counsel” relationship on his letterhead, business card, and telephone listings. He will be sharing office space and other services with the firm. As in the case of the municipal attorney, the public would perceive that the judge has a special relationship with the law firm.

The existing relationship between the municipal attorney and the law firm and the relationship that is contemplated between the judge and the law firm would raise justifiable questions of partiality not only in the minds of individuals appearing before the judge but also in the minds of the general public. There is an appearance of an association between the judge and the municipal attorney due to their common connection with the law firm. Internal office procedures the parties may establish to avoid any actual impropriety would be insufficient to overcome this perception. In actual practice, even the best guidelines may not prevent the inadvertent ex parte communication when there is a sharing of office space, staff, and other services.

The municipal attorney has contracted with the municipality to prosecute ordinance violations. The fact that he has subcontracted with another attorney to do the actual court appearances does not relieve him of the ultimate responsibility for the cases. As long as the municipal attorney has this responsibility, questions of partiality would exist if the judge enters into the “of counsel” relationship with the law firm

CONCLUSION

A part-time municipal judge may not enter into an “of counsel” relationship with a law firm where the firm has an existing “of counsel” relationship with the municipal attorney who has the responsibility of prosecuting ordinance cases before the judge.

APPLICABILITY

This opinion is advisory only, is based on the specific facts and questions submitted by the petitioner to the Judicial Conduct Advisory Committee, and is limited to questions arising under the Supreme Court Rules, Chapter 60 – Code of Judicial Conduct. This opinion is not binding on the Wisconsin Judicial Commission or the Supreme Court in the exercise of their judicial disciplinary responsibilities. This opinion does not purport to address provisions of the Code of Ethics for Public Officials and Employees, subchapter III of Ch. 19 of the statutes.

I hereby certify that this is Formal Opinion No. 04-1 issued by the Judicial Conduct Advisory Committee for the State of Wisconsin this 15th day of June 2004.

/s/ George S. Curry

Honorable George S. Curry
Chair